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No. 82-650

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1982

SHARON MARGARET PAVLAK,

Petitioner-Appellant,

vs.

JOHN R. CHURCH, etc., et al.,

Respondent-Appellee.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED FOR REVIEW

The sole issue raised by Plaintiff-Petitioner's Petition for Writ of Certiorari is whether, under the class action tolling rule stated in American Pipe & Construction Company v. Utah, 414 U.S. 538 (1974), the commencement of a class action under Federal Rules of Civil Procedure 23 tolls the applicable statute of limitation for a putative class member who later files a separate lawsuit instead of moving to intervene in the initial lawsuit after the court has denied class certification.

LIST OF PARTIES

The parties to this proceeding are those listed on the caption of the case.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i.
LIST OF PARTIES.....	i.
TABLE OF CONTENTS.....	ii.
TABLE OF AUTHORITIES.....	iii.,iv.
REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINION BELOW.....	v.
STATEMENT OF THE CASE.....	1
ARGUMENT.....	6
CONCLUSION.....	20

AUTHORITIES

	Pages
American Pipe and Construction Company v. Utah, 414 US 539 (1974)	i.
Glass v. Pfeffer, 657 F.2d 252 (10th Cir. 1981)	12
Knighton v. Watkins, 616 F.2d 795 (5th Cir. 1980)	12
Parker v. Crown, Cork and Seal Co., 677 F.2d 391 (4th Cir. 1982)	6
Pavlak v. Church, 681 F.2d 617 (9th Cir. 1982)	v.
Stull v. Bayard, 561 F.2d 429 (2nd Cir. 1977), affg. 424 F.Supp. 937 (S.D. N.Y. 1977), cert. denied 434 U.S. 1035 (1978).	3
Wachovia Bank & Trust Co. v. National Student Marketing Corp., 630 F.2d 342 (D.C. Cir. 1980), cert. denied 452 US 954 (1981).	3
White v. New Hampshire Dept. of Employment Security, 102 S.Ct. 1162 (1982).	12

RULES AND STATUTES

Federal Rule of Civil Procedure 59(e).	12

Federal Rule of Civil Procedure 23 15

42 USC §1988. 12

Supreme Court Rule 17 6

Idaho Code §5-218(1). 2

TREATISES AND ARTICLES

Frankfurter and Hart, The Business at the Supreme Court at October Term 1933, 48 Harv.L.Rev.238 (1939) . . . 9

Harlan, Manning the Dikes, 13 Record NYCBA 541, 552 (1958). 8-9

13 Moores Federal Practice and Procedure, ¶817.21, p.SC 17-23 . . . 9

3B Moores Federal Practice and Procedure, 1975 Supp., p. 155. . . . 20

Pettyman, Opposing Certiorari in the United States Supreme Court, 61 U.Va.L.Rev. 197 (1975). 9

Stern, Denial of Certiorari Despite a Conflict, 66 Harv.L.Rev. 465 (1953) . 9

THE OPINIONS BELOW

The official reports of the opinions issued by the lower courts in the case at bar are as follows:

Pavlak v. Church, Unpublished No. 80-1209, United States District Court for the District of Idaho (July 14, 1982).

Pavlak v. Church, et. al., 681 F.2d 617 (9th Cir. 1982).

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BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

A. Nature of the Case.

On August 11, 1980 Plaintiff-Petitioner filed an individual action for damages against a number of defendants, including Mountain States Telephone and Telegraph Company and several of its employees

(hereinafter collectively designated "Mountain Bell"). The Complaint alleged violations of federal and state law arising out of the alleged interception and recording of telephone conversations on a particular telephone in the Boise, Idaho City Police Dispatch Center during an approximately one month period ending on March 28, 1977.

The district court found that Petitioner's Complaint was filed more than three years after her cause of action had accrued and granted summary judgment against Petitoner on the ground that the Idaho three year statute of limitations, Idaho Code § 5-218(1) was applicable and barred the action. In so holding, the district court rejected Petitoner's argument that, because she was a member of the putative class on whose behalf two earlier class actions were commenced, the statute of limitations was tolled during the pendency of those actions until the date class certification was denied. Instead, the district

court followed The District of Columbia and Second Circuit's reading of American Pipe and held that an earlier filed class action does not toll the limitation as to a putative class member who files an independent action rather than intervening in the earlier action after denial of class certification. See Stull v. Bayard, 561 F.2d 429 (2d Cir. 1977), cert. den., 434 U.S. 1035 (1978); Wachovia Bank and Trust Company v. National Student Marketing Corp., 630 F.2d 342 (D.C Cir. 1980), cert. den., 452 U.S. 954 (1981).

The Ninth Circuit Court of Appeals affirmed the decision of the district court, specifically noting that the issue presented was one to be determined by the application of federal law and the principles and policies underlying the Federal Rules of Civil Procedure. Stated most simply, the Ninth Circuit held:

> "If a class member chooses to file an independent action, he or she may do so regardless of the pendency of the suit in which there is a motion to certify. We

> think that in this instance the plaintiff should determine either to abide by the class certification motion, and file for intervention if it fails, or, on the other hand, commence an independent suit at the outset. . . . If, as here, the latter course is taken and class certification is denied, principles of equity give the putative class members a chance to intervene in the suit, thereby approximating the status quo ante. These equitable principles do not extend to permit the plaintiff to take advantage of the alternative of a separate action after the limitations period has expired." 681 F.2d at 620.

Petitioner does not seek review of the lower court's determination that the cause of action accrued more than three years before the suit was commenced; nor does she contend that the applicable statute of limitations is other than the three year period provided in Idaho Code § 5-218(1). Thus, Petitioner concedes that her Complaint and cause of action are barred by the statute of limitations unless the tolling rule set forth in American Pipe is applicable to her case.

B. Statement of the Facts.

The issue presented by the Petition for Writ of Certiorari is procedural; therefore, the substantative facts which underlie the plaintiff's cause of action are irrelevant. Rather, only three facts are material at this juncture of the case: (1) Petitioner's Complaint was filed more than three years after her cause of action accrued; (2) Petitioner was a member of the putative class in two earlier actions based on the same factual circumstances and claims; and (3) Petitioner failed to intervene in either of the earlier actions after the trial court denied class certification despite having filed an affidavit and request to participate as a class member in those actions.

The Defendant-Respondents' position, which was adopted both by the district court and the Ninth Circuit Court of Appeals, is that Petitoner's cause of action accrued not later than April of 1977, that her separate action was filed more than three years later in August of

1980, and that Petitioner was not entitled to the benefits of any tolling provision. Therefore, her Complaint was barred.

ARGUMENT

The sole question now before the Court is whether this Court should undertake discretionary review by certiorari. It is the apparent position of the plaintiff-petitioner that the decision of the Ninth Circuit conflicts with the decision recently reached by the Fourth Circuit in Parker v. Crown, Cork and Seal Company, 677 F.2d 391 (4th Cir. 1982). While plaintiff-respondent, Mountain Bell, must concede the existence of a conflict between the Ninth Circuit's holding in the case at bar and the Fourth Circuit's Parker decision, there are several factors that militate against the grant of certiorari in this case.

Supreme Court Rule 17 provides in relevant part:

> ".1 A review on certiorari is not a matter of right, but of judicial discretion and will be

> granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons that will be considered.
>
> > "(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter. . . ."

The first sentence of Supreme Court Rule 17 emphasizes that the grant of review by certiorari is a matter of discretion that will be afforded only where there are compelling reasons therefor. The mere existence of a conflict between the decisions of two circuits, in and of itself, is insufficient to justify the Court's exercise of its discretionary jurisdiction. Rather, Rule 17 is clear recognition of the often competing functions of the Supreme Court: On the one hand, the Supreme Court must account for and seek to achieve a uniform application of federal law in the

intermediate federal court system; on the other hand, the Supreme Court must contend with a burgeoning case load wherein petitions for certiorari routinely exceed five thousand per year.

Accordingly, notwithstanding a conflict in the decisions of two circuits, the Court has refused to accept certiorari where the issue is unlikely to reoccur because the conflict arose over a statute since repealed or where the conflict can be explained as being the result of variations in the factual patterns underlying each decision. Most importantly, the Court will refuse to grant certiorari where resolution of the conflict will not serve important procedural or substantive interests:

> "The nub of all these qualifications is that a conflict of decision may safely be relied on as a ground for certiorari only in instances where it is clear that the conflict is one that can be effectively resolved by the Supreme Court alone, and that the disagreement among the lower courts is one that should

> promptly be dissolved." Harlan, Manning the Dikes, 13 Record YCBA 541, 552 (1958).

See also Stern, Denial of Certiorari Despite a Conflict, 66 Harv.L.Rev. 465, 472 (1953); Pettyman, Opposing Certiorari in the United States Supreme Court, 61 U.Va.L.Rev. 197 (1975); Frankfurter and Hart, The Business of the Supreme Court at October Term 1933, 48 Harv.L.Rev. 238, 268-269 (1939), which cogently notes: "One point may be stressed: the Court is interested in conflicts which impair uniformity of decision where uniformity is significant, conflicts which its decision in the particular case will remove." In recent years, the focus on the "significance of the issue" element has increased. Although there may be some dispute as to the reason for this change of focus, one explanation is provided in 13 Moore's Federal Practice, ¶ 817.21 at SC 17-23:

> "As the Court has increasingly devoted its efforts to the decision of constitutional issues, it has tended to accept cases for

> review by certiorari only when they present a conflict as to an important federal question." [footnote omitted]

The foregoing is not intended as an extensive review of the grounds for granting or denying certiorari. Such a review would require an analysis of the thousands of petitions that are filed with the Court each year. Moever, even such an analysis could not account for the discretionary aspect of the certiorari decision.

In the case at bar, this Court should exercise its discretion by denying certiorari for the following reasons: (1) The issue presented is not significant in that uniformity of decisions among the circuits is not necessary to protect litigants' substantive or procedural rights; (2) the issue is not ripe for Supreme Court review; and (3) the issue was fully briefed in the lower courts and the decision reached by the Ninth Circuit reflects a careful adjudiciation of the issue.

(1) The issue presented is not significant. As emphasized above, certiorari will be granted in a "conflict between the circuits" situation only where the legal issue presented is sufficiently serious that compelling reasons exist to justify the supervisory jurisdiction of the Supreme Court. Such seriousness and compelling reasons do not exist in this case.

Under this Court's decision in American Pipe and the Ninth Circuit's opinion in the case at bar, a putative class member is protected by being allowed to intervene in the primary action, notwithstanding expiration of the limitation period prior to denial of class certification. Similarly, under the Fourth Circuit's decision in Parker, a class litigant is protected by being permitted to file a separate action. Thus, although a conflict exists in the rationale underlying the decisions of the Ninth and Fourth Circuits, both decisions adequately protect the class litigants'

substantive rights following denial of class certification. The seriousness of the "conflict in the decisions" is therefore overstated by Petitioner.

In White v. New Hampshire Department of Employment Security, _____ U.S. _____, 102 S.Ct. 1162, 71 L.Ed.2d 325 (1982), this Court held that a post-judgment request for attorney's fees under the Civil Rights Attorney's Fees Act, 42 U.S.C. §1988 was not subject to the ten day timeliness provision of Fed.R.Civ.P. 59(e). The issue had been the subject of conflicting decisions of the Court of Appeals. See e.g., Glass v. Pfeffer, 657 F.2d 252 (10th Cir. 1981); Knighton v. Watkins, 616 F.2d 795 (5th Cir. 1980). For present purposes, the significant portion of the Supreme Court's opinion states:

> "Section 1988 authorizes the award of attorney's fees 'in [the] discretion of the court.' We believe that this discretion will support a denial of fees in cases in which a post-judgment motion unfairly surprises or

> prejudices the affected party. Moreover, the district courts remain free to adopt local rules establishing timeliness standards for the filing of claims for attorney's fees." (Emphasis added). 71 L.Ed.2d at 333.

Subsequent to the decision in White v. New Hampshire, the district courts have in fact promulgated local rules govening the procedure and time limitations for filing attorney fee applications under § 1988. In light of numerous considerations, the procedures and time limits actually prescribed by such local rules are not uniform throughout the various circuits.

Similarly, in the case at bar, the procedure to be followed after class certification is denied is properly cognizable by local rules. In the limited procedural matter at issue, there is no need for uniformity across the country. The only relevant concern is that the interests of the litigants be protected. As discussed above, under either the Ninth or the Fourth Circuits' formulation,

subsequent to the denial of class certification the putative class members will be protected.

(2) The issue is not ripe for Supreme Court consideration. Under Supreme Court Rule 17, certiorari is only appropriate where the disagreement among the lower courts is one that should promptly be resolved. If the parameters of the disagreement between the circuits lacks concreteness, the issue is not ripe for review and certiorari should be denied. In both the Ninth and Fourth Circuits' decisions, the courts relied extensively upon policy grounds to support their rulings. Such reliance is implicit, if not explicitly stated, whenever a court judicially formulates a doctrine whose effect is to toll a statute of limitations. The policies underlying the Ninth Circuit's decision in the case at bar are well stated in the district court opinion which was affirmed by the Second Circuit in Stull v. Bayard, supra:

> "There is nowhere in the [American Pipe] opinion any suggestion that a separate

> independent action by a class member could be maintained. The opinion emphasized that its interpretation of the class action rule 23 was 'necessary to insure effectuation of the purposes of litigative efficiency and economy that the rule in its present form was designed to serve.' (414 U.S. at 556) It certainly would not effectuate litigative efficiency and economy to permit any number of separate, independent actions by class members on time barred claims. The separate opinion of Mr. Justice Blackman points out that the American Pipe principle will not unduly encourage the assertion of stale claims because these can only be asserted through intervention." 424 F.Supp. at 942-943.

This Court's decision in American Pipe also recognized the important policy of avoiding numerous separate lawsuits:

> "Thus, the commencement of the action satisfied the purpose of the limitation provision as to all those who might subsequently participate in the suit, as well as for the named plaintiffs. To hold to the contrary would frustrate the principal function of a class suit, because then the sole means by which members of the

> class could assure their participation in the judgment if notice of the class suit did not reach them until after the running of the limitation period would be to file earlier individual motions to join or intervene as parties -- precisely the multiplicity of activity which Rule 23 was designed to avoid." 414 U.S. at 551

Although the result reached by the Ninth Circuit in the case at bar conflicts with the Fourth Circuit in Parker, the conflict exists due to a disagreement as to the weight to be given the applicable policy considerations. This court may ultimately be called upon to provide the final determination, however, the necessary weighing and balancing of policy cannot effectively be made until litigants have been allowed the opportunity to operate under the two divergent rules. Thus, the Supreme Court should deny certiorari in the instant case to await further judicial responses to the issue raised.

Moreover, under the specific factual and procedural history of this case, a decision by the Supreme Court at this point will in effect be advisory and not fully dispose of the case. Defendant-Respondent, Mountain Bell, has pending before the Ninth Circuit a Cross-Appeal contending that, even if the time was tolled during the pendency of the class certification dispute, the Plaintiff-Petitioner's Complaint was barred by a two year statute of limitation. The Ninth Circuit found it unnecessary to address the Cross-Appeal in light of its decision holding that the time was not tolled for the Petitioner's separate action. However, if this Court grants certiorari and reverses the Ninth Circuit, the reversal will not fully dispose of the procedural dispute. Rather, the case would have to be remanded to the Ninth Circuit for further consideration of the Cross-Appeal.

(3) The result reached by the Ninth Circuit is correct. Finally, without

exhaustively addressing the substantative merits of the issue, Defendant-Respondent respectfully submits that the Ninth Circuit's decision is consistent with the view of the majority of courts which have squarely been confronted with the issue raised in the petition for certiorari. Those courts have held that American Pipe provides no protection from the running of the statute of limitations where a class member files a separate suit rather than intervening in a pending action after denial of class certification in such action. Reference is again made to the persuasive analysis in Stull v. Bayard which was adopted by the Ninth Circuit in the case at bar:

> "The Supreme Court [in American Pipe] then affirmed, saying (among other things):
>
> > 'We hold that in this posture, at least where class action has been denied solely because a failure to demonstrate that the "class is so numerous that joinder of all members is

> impracticable," the commencement of the original class suit tolls the running of the statute for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status.'

"The Supreme Court went out of its way to specify that the limitations statute was tolled by a class action only as to those purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status.

"[Plaintiff Stull] is not within the American Pipe Rule of tolling. He did not move (timely or not) to intervene in the then pending action after class action status had been denied to that action. [Plaintiff] went counter to and defied the American Pipe principle by commencing a separate and independent action, thus increasing the volume of federal litigation and defeating the economy and efficiency which it was the object of the present class action Rule 23 to bring about." 424 F.Supp. at 942-943.

Similarly, 3B Moore's Federal Practice 1975 Supplement, at page 155, concludes regarding the effect of American Pipe: "On balance, then, it seems likely that the class member may not file an independent suit after the claim is time barred."

Mountain Bell respectfully submits that the decision of the Ninth Circuit, relying on the Second Circuit's decision in Stull v. Bayard, is the more reasoned approach to resolution of the problem and more carefully accounts for the policy considerations that must govern the Federal Rules of Procedure.

CONCLUSION

In recent years, the Supreme Court has faced an increasing burden of sifting through innumerable petitions for certiorari. While, in the past, a decision of a federal circuit court which conflicted with a decision of another circuit court may have provided a sufficient basis to justify the grant of certiorari, the reality of the expanding case load has required

this Court to more carefully exercise its discretionary jurisdiction. Specifically, notwithstanding a conflict in circuit court opinions, certiorari will be granted only where the issue presented is substantial and involves a compelling need for the supervisory control of the Court. The case at bar simply does not fit that pattern.

Even conceding that the Ninth Circuit's decision conflicts with that of the Fourth Circuit, the issue presented is insubstantial in that litigants' substantive rights will be protected under either procedural approach; and either approach can be adopted by local rule. Consequently, the need for nation-wide uniformity in federal practice and procedure is absent.

Moreover, the resolution of this issue is not mandated by the clear terms of any one of the Federal Rules of Civil Procedure. Rather, the result is dictated by analyzing the policies which underly the federal rules,

including the judiciary's justifiable reluctance to engender additional litigation. An ultimate decision on this issue by the Supreme Court is premature and should await the results of actual practice under the two approaches.

Finally, the respondents of course submit that the Ninth Circuit's approach is correct. This assertion is, however, based on more than a mere desire for affirmance: The Ninth Circuit's approach is well-reasoned and appropriately accounts for the policies noted above.

Accordingly, Defendant-Respondent respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of December, 1982, three true and correct copies of the foregoing RESPONSE BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT was served upon the following attorneys by depositing the same in the United States mail, postage prepaid:

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